

Issues Regarding Social Media Evidence

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A video showing the defendant sitting in a stolen vehicle, wearing the victim's watch, a photo showing the plaintiff--the bereaved husband of the deceased victim wearing a t-shirt emblazoned with "I love hot moms," and Instagram posts of a bankrupt rapper posing with expensive vehicles and jewelry are among the many examples of social media evidence courts have considered for admittance.

Given the ever-growing presence and prevalence of social media, trial lawyers and trial court judges will be addressing the discoverability and admissibility of such evidence with increasing frequency. The first issue, the scope of discovery of social media, remains guided by the same principles applicable to the discovery of conventional evidence. The second issue, the authentication of social media evidence, while more challenging and problematic for both the lawyer and the trial judge, is similarly guided by well-established law.

Discoverability of Social Media Evidence

The consideration of whether social media is discoverable in a particular case is governed by Rule 4:1(b)(1) of the *Rules of Supreme Court of Virginia* which states in pertinent part that : "...parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...". Consistent with the wide scope of discoverability, the Rule further provides that admissibility is not determinative, rather the test being whether "...the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

In the context of social media accounts, two competing interests are at play. First is the right of the party seeking the social media to discover information "relevant to the subject matter involved in the pending action". That interest requires the courts to consider the claims and defense of the parties in each particular case. *James v. Edwards*² and the cases cited therein are examples where the claims or defenses of the parties resulted in the trial court permitting the

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² *James v. Edwards*, 85 Va. Cir. 139 (Cir. Ct. Greensville County, 2012).

discovery of social media accounts. *James* is a personal injury case in which James, the passenger, sued Edwards, his host driver and friend, claiming permanent head injuries, past and future pain, mental anguish, inconvenience, and other ongoing damages. Edwards obtained photos of James partying and drinking alcohol since the accident and James's Facebook profile referenced him participating in binge drinking. In ruling that the credentials to James's Facebook account were discoverable, the court referenced the discussion of "relevant to the subject matter" in *McNeir v. Greer-Hale Chinchilla Ranch*³. In doing so, the *James* court concluded that Edwards had established a "factual predicate" with respect to the relevancy of the evidence as the drinking and partying depicted in James's Facebook pictures may be relevant to the severity of his claimed injuries. In *McMillen v. Hummingbird Speedway, Inc.*⁴, another personal injury case, the court found that Facebook posts made by the plaintiff regarding a fishing trip and attending the Daytona 500 race "could help prove either the truth or falsity of his alleged claims." In *Romano v. Steelcase, Inc.*⁵ the court granted discovery of plaintiff's social networking sites because "[her] Facebook shows her smiling happily in a photograph outside the confines of her home despite her claim that she has sustained permanent injuries and is largely confined to her house and bed."

The second interest addressed by the courts are the privacy expectations of the social media poster and site user. Those concerns are not persuasive with the courts. Citing Facebook's data use policy which provides that information shared on Facebook can be re-shared by anyone who sees it, the *James* court stated James's privacy expectations were meritless. The *McMillen* similarly cited Facebook's privacy policies in disposing of McMillen's privacy objections.

Admissibility of Social Media Evidence

As is true of all evidence, to lay a foundation for the admission of social media evidence requires that it be relevant⁶ and authenticated⁷. While authentication simply means presenting sufficient evidence for the fact finder to conclude the thing is what the proponent claims it to be, relevance in the context of social media

³ *McNeir v. Greer-Hale Chinchilla Ranch*, 194 Va. 623, 628, 74 S.E.2d 165, 169 (1953).

⁴ *McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, at *11-12 (Sept. 9, 2010).

⁵ *Romano v. Steelcase, Inc.*, 30 Misc. 3d 426, 430, 907 N.Y.S. 2d 650, 654 (2010)

⁶ Rule 2:401 of V.R.E. defines "relevant evidence" as "...evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence." Rule 2:402(a) of V.R.E. provides that "All relevant evidence is admissible"..."Evidence that is not relevant is not admissible."

⁷ Rule 2:901 provides that "The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the thing in question is what its proponent claims." See also *United States v. Vidacak*, 553 F.3d 344, 349 (4th Cir. 2009). *Vidacak* involved a discussion of Rule 901 of the Federal Rule of Evidence, which is identical to VRE 2:901 in all material respects.

requires presenting sufficient evidence to permit the fact finder to conclude who authored the post. The two Virginia state court cases addressing the issue of admissibility of social media evidence referenced well-established law in determining the foundational evidence needed to establish relevance and authenticity. Additionally, the evidence needed for both overlaps. In *Atkins v. Commonwealth*⁸, 68 Va. App.1, 800 S.E. 2d 827 (2017), the defendant appealed his conviction for breaking and entry and grand larceny citing as error, in part, the trial court's admission of 20 text messages and a tweet that were on his cell phone when he was arrested. The tweet advertised a money counter for sale accompanied with a photo of the stolen machine, which had been recovered by law enforcement when searching the defendant's bedroom. The text messages also communicated that a money counter was for sale, as was a "mack book...pro", listing the serial number of the stolen MacBook. As the defendant identified the cell phone as his when he was initially stopped and subsequently provided the passcode to law enforcement, and a special agent with the High Technology Crimes Division of the Virginia Department of State testified that the social media application installed on the phone had been created with an email address containing the defendant's name, the defendant did not contest ownership of the cell phone. Rather, at trial he challenged the admission of the texts and the tweet on the grounds that the identity of the sender had not been proved. In overruling Atkins's objection, the trial court noted that the tweet and the texts were sent from "his phone, the phone he used." In affirming the admission of the texts and the tweet, the Court first noted that "The measure of the burden of proof with respect to factual questions underlying the admissibility of evidence is proof by a preponderance of the evidence."⁹ The Court then stated that "Although the type of evidence used to prove the identity of the person making the statement may vary based in part upon the medium used to convey the message, the governing legal standard is the same—proof by a preponderance of the direct evidence, circumstantial evidence, or a combination of both."¹⁰ The Court further noted that "[t]he completeness of the identification goes to the weight" afforded "the evidence rather than its admissibility..¹¹ Applying the preponderance of the evidence standard, the Court ruled that sufficient evidence was presented to find that Atkins made the texts and the tweet and affirmed the trial court's ruling that they were sufficiently authenticated.¹²

In *Simpson v. Commonwealth*¹³, the Court considered the challenged admission of screen shots of text messages sent by Simpson to his estranged wife following his jury conviction for armed burglary, entering the home of another

⁸ *Atkins v. Commonwealth*, 68 Va. App.1, 800 S.E. 2d 827 (2017)

⁹ *Atkins*, 68 Va. App. 1, 9, citing *Bloom v. Commonwealth*, 262 Va. 814, 821, 554 S.E.2d 81, 87 (2001)

¹⁰ *Atkin*, 68 Va. App. 1, 9, citing *Bloom v. Commonwealth*, 262 Va. 814, 821, 554 S.E.2d 81, 87 (2001)

¹¹ *Atkins*, 68 Va. App. 1, 9, citing *Armes v. Commonwealth*, 3 Va. App. 189, 193, 349 S.E.150, 153 (1986).

¹² *Atkins*, 68 Va. App. 1, 9.

¹³ *Simpson v. Commonwealth*, 2017 Va. App. LEXIS 292 (2017) (Unpublished).

protected by a court order, and assault and battery. Following their separation, Simpson sent several text messages to his wife, who took screen shots of them and uploaded them to her computer. On appeal, Simpson argued that the Commonwealth failed to establish the reliability of the screenshots and also that he sent the screen shots. Citing to *Atkins*, the Court again stated that the burden of proof regarding factual questions underlying the admission of evidence is proof by a preponderance of the evidence.¹⁴ In affirming the trial court, the *Simpson* Court noted that Simpson's estranged wife testified that she received the texts, described how she preserved them, and to the personal information in the texts that convinced her that her husband was the author.

Conclusion

In practice, discovering social media evidence is subject to the same rules and foundational requirements as the discovery of all other potential evidence. That is, its discovery must appear reasonably calculated to lead to the discovery of admissible evidence. As shown by the *Edwards* court, that requires the moving party to present some "factual predicate" supporting discovery. Absent that, such discovery can be challenged as a mere "fishing expedition". As to the admissibility of social media evidence, the movant should present as much evidence as possible to prove the evidence is authentic, i.e. not falsified or manipulated, and that it was created or authored by the party.

¹⁴ *Simpson*, 2017 Va. App. LEXIS 292.